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Nos. 84-801 and 84-805

In the Supreme Court of the United States

OCTOBER TERM, 1985

MIDLANTIC NATIONAL BANK, PETITIONER

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL RESOURCES

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

THOMAS J. O'NEILL, PETITIONER

v.

CITY OF NEW YORK

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICUS CURIAE*

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 84-801

MIDLANTIC NATIONAL BANK, Petitioner

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3, the undersigned, who is contemporaneously applying for admission to the Bar of this Court, and who is appearing pro se, moves for leave to file the attached brief as an amicus curiae in the

event that consent to the filing of the brief is not granted by all the parties.

The amicus is a teacher and scholar of the bankruptcy law. The issues in this case involve a subject in which he has a special interest and about which he has written. Except for that academic interest, he has no interest in the outcome of this case.

Amicus believes that he takes a view of the issues involved in this case and their proper resolution that is distinct from that likely to be taken by any of the parties. The issues are important, and in resolving them the Court should have the benefit of a presentation of all the competing views. Amicus believes that in submitting this brief, he is acting within the core meaning of a brief amicus curiae.

CONCLUSION

For the reasons stated, the motion for

leave to file the attached brief should be granted.

Respectfully submitted.

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April, 1985

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MIDLANTIC NATIONAL BANK, Petitioner

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BRIEF FOR AMICUS CURIAE

SUMMARY OF ARGUMENT AND INTRODUCTION

Quanta Resources Corp. ("Quanta") owned and operated a waste oil storage and processing facility in New York City.[1] The

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1. The facts describe No. 84-805, Thomas J. O'Neill v. City of New York. A companion case, No. 84-801, Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, involves an indentical issue concerning the abandonment of a waste oil and oil sludge site in

site on which it was located contained storage tanks with hundreds of thousands of gallons of waste oil and other chemicals. Approximately 70,000 of these gallons were contaminated with polychlorinated biphenyls ("PCBs"). Quanta filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 301, on October 6, 1981. The bankruptcy case was converted to Chapter 7, the liquidation chapter, a little over a month later, on November 12, 1981.

Bringing the waste oil storage site into compliance with a variety of federal, state, and local laws governing the storage and disposal of PCBs would have required a substantial expenditure of funds. The trustee in bankruptcy concluded

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Edgewater, New Jersey. The New Jersey Department of Environmental Protection, however, has not asserted that it should be reimbursed for clean-up expenses, In re Quanta Resources Corp., 739 F.2d 927, 929 (3d Cir. 1984). For that reason, Amicus will concentrate on the case involving the City of New York.

that the expenditures that would be required to bring the site into compliance with those environmental statutes would have exceeded the value of the property, rendering the site a net burden to the estate. The trustee thereupon moved to abandon the property pursuant to Section 554 of the Bankruptcy Code, 11 U.S.C. § 554. The City of New York (the "City") objected to that action, on the ground that abandonment of the property would constitute a disposal of the hazardous wastes, in violation of state and local law. In addition, the City asserted that abandonment of the site would create a continuing violation of state and local hazardous waste storage laws.

The bankruptcy court permitted the abandonment over the objections of the City and refused to stay its order pending appeal. As a consequence, the property was abandoned and the City thereupon proceeded to clean up the site, with the exception of the

contaminated subsoil.[2] This clean up cost the City approximately $2.5 million. The City had sought, and the bankruptcy judge had refused to grant the City, a first lien on the property to the extent of such expenditures.

The City appealed the order to the district court, without raising the question of its right to a lien on the site. The district court affirmed the order on January 24, 1983. The City thereupon appealed to the Third Circuit Court of Appeals which, on July 20, 1984, reversed the judgment, one judge dissenting. In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984).[3] The Third Circuit viewed the issue to be resolved as one of "balancing"

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2. The property was subject to two mortgages. Apparently because the site was without value while subject to the clean-up requirement, the mortgagees abandoned their mortgages on the property. See 739 F.2d, at 914 n.3.

3. The companion case, No. 84-801, involving the New Jersey Department of Environmental Protection, was reversed on the basis of that opinion, In re Quanta Resources Corp., 739 F.2d 927 (3d Cir. 1984).

environmental policies with bankruptcy policies, as reflected in the provision permitting abandonment. It viewed the balance as landing on the side of the environmental laws, reasoning, 739 F.2d, at 921-22:

> But the extent . . . of the expenditures necessary to dispose of the waste properly is not in itself sufficient to outweigh the public interest at stake here. . . . If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation -- the substitution of governmental action for citizen compliance -- without an indication that Congress so intended. The supremacy clause does not require the suspension of the operation of New York's hazardous waste disposal laws.

The Third Circuit, however, did not reach the issue of the priority, if any, on Quanta's remaining assets of the claim of the City for the clean up, finding that to be an issue "that can properly be resolved only by the bankruptcy court," 739 F.2d, at 923.

This Court granted certiorari on

February 19, 1985.

The Third Circuit's approach to this problem is wrong.[4] The Third Circuit went astray by perceiving there to be a conflict between bankruptcy law and environmental law. Proper analysis of the question reveals that no such conflict exists. Bankruptcy law is primarily a procedural forum for collecting

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4. Amicus suggests, however, that this Court may want to consider dismissing these cases, on the ground that certiorari was improvidently granted. On the issue of the propriety of abandonment, the Third Circuit's answer, although wrong in amicus' view, is actually dicta. The property was abandoned; no stay was obtained. The City has cleaned up the site itself. It would therefore appear that the only remaining issue in No. 84-805 is whether the City can get repaid for its expenses in cleaning up the site. No holding on that issue is before this Court. The City did not appeal the bankruptcy judge's determination that it did not have a first lien on the abandoned property, nor is there any ruling as to who now owns the site. No lower court has yet ruled on the issue of the priority of the claim of the City against Quanta's remaining assets. Indeed, the Third Circuit expressly remanded for consideration of that issue, 739 F.2d, at 923. The posture of the companion case seems substantially similar, 739 F.2d, at 929.

The remainder of this brief will assume, contrary to that point, that the Court does not dismiss these cases on the ground that certiorari was improvidently granted.

assets and distributing them to claimants according to their nonbankruptcy entitlements. The real issue in this case, as Judge Gibbons noted in dissent, 739 F.2d, at 923, is not one of weighing the relative importance of a bankruptcy policy in favor of abandonment, but, rather, one of deciding what is the priority of various claims against the assets that do exist. Resolution of that question, however, is determined by nonbankruptcy law. It is simply wrong to view bankruptcy policy as somehow affecting the answer to this problem.

The proper analysis would be to ask what would have happened had Quanta dissolved under state law without ever passing through bankruptcy. If Quanta is insolvent, it will not be able to pay in full all those with claims against it. That is a fact that is not a matter of bankruptcy law, but rather of the reality of too few assets (a problem created, in part, by long established state

law rules regarding limited liability of shareholders for the debts of their corporations).[5] In paying off claimants, moreover, some claimants may do better than others. Those with security interests or statutory liens, for example, may be paid in full while general unsecured creditors will share only in what is left over. How well the City would have done in a dissolution of Quanta under state law depends entirely on the status of clean-up obligations under state and nonbankruptcy federal law. The question, ultimately, is: Who pays for the clean-up? To say that the City has first right to all of Quanta's assets is to say that the other creditors must pay for the clean up, at least to the extent of the

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5. This is not to say that a state could not have a different policy regarding toxic wastes. It could hold managers or principal shareholders personally liable. It could require bonding or insurance by any firm dealing in toxic wastes. None of these responses, however, is involved in the current cases.

value of those assets. To say that the City does not have first right, means that the City will share with the other general creditors in Quanta's limited assets in a dissolution of Quanta under state law. To the extent its claim is unsatisfied in that distribution, the City will have to bear the cost itself. But that result cannot involve bankruptcy policy, because bankruptcy is not involved at all when a corporation dissolves under state law.

Nothing changes -- or should change -- in bankruptcy. The question of abandonment in this case has obscured the only important issue -- which is the one the Third Circuit did not decide. The City may have priority over the other creditors of Quanta with respect to its claim based on the money spent to clean up the waste site. But if it does, that is because nonbankruptcy law gives it that priority, and would recognize that priority in a dissolution of Quanta under

state law. No bankruptcy policy is involved; there is no bankruptcy policy to "balance" with environmental policy. Refusing to permit abandonment is tantamount to saying that all of Quanta's assets must be devoted first to cleaning up the site. But all that does is to resolve an identical priority issue by favoring the claim based on a clean-up right over the claims of other creditors of Quanta. No court has examined whether that is the proper resolution of the priority issue as a matter of nonbankruptcy law, and bankruptcy law takes -- and should take -- property (and priority) rights as they are established by nonbankruptcy law. To hold abandonment is improper obscures the real issue in this case, and may change relative nonbankruptcy entitlements, encouraging the kind of "forum shopping" denounced by Butner v. United States, 440 U.S. 48, 54-55 (1979).

ARGUMENT

Before running to bankruptcy policy, it is useful to understand what would have happened had no bankruptcy petition been filed. When that is done, it is clear that the core issue in this case concerns not a conflict with bankruptcy policy but the fact of a corporation that is insolvent and cannot pay all its debts in full. Because of that fact, one must face the question of who gets the assets that are there in what order -- a question of priority among claimants. In particular, the underlying question is the status of the City's claim based on either its right to have the site cleaned up or its right to be reimbursed for cleaning up the site itself. Resolution of this issue involves considering the general effects of state, and perhaps federal, law. But to focus on bankruptcy policy, and specifically on abandonment, as somehow at the crux of

this dispute is, as amicus will show, a red herring.[6] Indeed, it is worse: disallowing

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6. The Third Circuit relied, in part, on the impact of § 362(b)(4), 11 U.S.C. § 362(b)(4), excepting from the automatic stay state actions to protect the health and safety of the public. Relying on Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984), the Third Circuit in this case viewed the clean-up order as exempt from the automatic stay. This approach suffers from exactly the same infirmities as does the Third Circuit's abandonment analysis; indeed, the core issue in the two cases is identical. Section 362(b)(4) has a natural reading. The automatic stay should not apply to governmental regulations that tell a firm not to pollute in the future. That is a cost of doing business, and the fact that a bankruptcy proceeding has commenced should be irrelevant. Section 362(b)(4) makes it irrelevant: the automatic stay will not protect a debtor in bankruptcy from ongoing regulatory orders (such as if debtor emits pollutants in its operations, it must install a scrubber to continue to operate). But that cannot apply to this case. Quanta is liquidating. It has no future business. The issue in this case is who pays for the clean-up of something Quanta did in the past. As such, it is a "claim" based on a pre-bankruptcy action of Quanta. Ohio v. Kovacs, 105 S.Ct. 705 (1985). The automatic stay should apply (at least in the first instance); if it did not, and Quanta had to do the clean up, one again would be resolving, without even confronting, the underlying issue of priority. If the claim is an unsecured claim, the stay should not be lifted. This does not mean that the clean up should not take place. Nothing in § 362(b)(4) should prohibit the governmental unit from effecting the clean-up itself. It is simply a question, again, of who pays for it. See Baird & Jackson, Kovacs and Toxic Wastes in Bankruptcy, 36 Stan. L. Rev. 1199, 1199 n.3, 1202-10 (1984).

abandonment, to the extent it is tantamount to requiring the trustee to effect a clean up, resolves an underlying priority issue whose answer should be given by nonbankruptcy law. See 739 F.2d, at 923 (Gibbons, J., dissenting); see generally Jackson, Translating Assets and Liabilities to the Bankruptcy Forum, 15 J. Legal Studies 73 (1985).

The question in this case is not whether Quanta must comply with the environmental laws of New York with respect to future operations. If it had wanted to continue in business, it, like any other business, would have had to comply with those environmental laws or pay the penalty. Cf. Reading Co. v. Brown, 391 U.S. 471 (1968) (post-bankruptcy tort a cost of doing business entitled to priority over pre-bankruptcy claimants). If those laws prohibited it from dumping PCBs at its site, it would not -- and should not -- be permitted to dump PCBs in the future. But

that cannot be the issue in this case. Quanta is liquidating. Quanta will have no future operations. At issue in this case is who pays for the clean up of a pre-bankruptcy violation of environmental laws. To say that Quanta must pay is to say that Quanta's creditors must pay, because Quanta is insolvent.[7] The holding of the Third Circuit prohibiting abandonment apparently means that the trustee must use all of Quanta's assets to clean up the site. But that is tantamount to a holding that the claim of the City based on that clean-up right[8] has priority over all the other creditors of Quanta. That holding, however, implicates state (and perhaps federal) law policy. It is not a bankruptcy

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7. If Quanta is not insolvent, then all its claimants — including the City — will be paid in full and there is no issue worth litigating.

8. As to why a clean up right is a "claim," see Ohio v. Kovacs, 105 S.Ct. 705 (1985); Baird & Jackson, Kovacs and Toxic Wastes in Bankruptcy, 36 Stan. L. Rev. 1199 (1984).

issue. Indeed, the Third Circuit, when it faced the issue directly, refused to resolve it.[9] Focusing on abandonment misses what is at issue.

This case, although it ostensibly involves a different section of the Bankruptcy Code, is remarkably similar to Ohio v. Kovacs, 105 S.Ct. 705 (1985). In Kovacs, the focus was on whether a clean up obligation was a "claim" or a "debt" under 11 U.S.C. §§ 101(4) and (11). But by initially resorting to those sections, the litigants obscured the real issue. In Kovacs, as in this case, the real question was not whether something was a claim (it was) or whether the trustee can abandon property (he can) but rather a question of priority among

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9. This odd result is a consequence of the fact that the "no abandonment" decision in this case was actually dicta. Abandonment had occurred and the City had already cleaned up the site. See note 4 supra (discussing whether this case should be dismissed on the ground that certiorari was improvidently granted).

claimants. Resolution of that issue raises, in different garb, the analysis used by this Court in Chicago Board of Trade v. Johnson, 264 U.S. 1 (1924). And that question is whether the City has a property right, equivalent to a statutory lien or a security interest, in Quanta's assets to secure performance of that obligation.

Not all claims are created equal by state law, and bankruptcy law, which is largely procedural, generally respects the different attributes of state-law claims.[10] For that reason, a longstanding policy of bankruptcy law is that it respects the value

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10. This respect is not accorded to state laws that have an effect only in bankruptcy -- state-created priorities and spurious statutory liens, 11 U.S.C. § 545. But if the property interest (whether labeled a lien or not), although created by statute, is effective against competing claimants in and out of bankruptcy, no provision of the Bankruptcy Code and no bankruptcy policy invalidates the interest. See In re Anchorage International Inn, Inc., 718 F.2d 1446 (9th Cir. 1983); In re Telemart Enterprises, Inc., 524 F.2d 761 (9th Cir. 1975); Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857, 901-06 (1982).

of property rights created by state law to the extent that doing so is not inconsistent with the goals of the bankruptcy process. As this Court noted in Butner v. United States, 440 U.S. 48, 54-55 (1979):

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." Lewis v. Manufacturers National Bank, 364 U.S. 603, 609.

For example, if a claim is secured, or the subject of a statutory lien or a statutory trust, the claim is entitled to be paid first out of the associated assets, 11 U.S.C. § 725. See also Ohio v. Kovacs, 105 S.Ct. 705, 712 (1985) (O'Connor, J., concurring).11

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11. Equally, if such a claim is not paid in bankruptcy, the "lien" given by statute or the secured contract will "pass through" bankruptcy and be enforceable against the debtor's pre-bankruptcy property, notwithstanding that the underlying debt

The real question in this case is the status of the rights of the City against the property of the estate created by 11 U.S.C. § 541. And that, in turn, involves a question of the relative "priority"[12] of the right the City has to use those assets to satisfy its claim vis-a-vis the rights of holders of other pre-petition obligations. This priority can result not only from consensual security interests, statutory liens, or statutory trusts -- all cases of which are, or should be, uncontroversial -- but also from simply observing the entitlements of a

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itself was discharged. This doctrine, which was first enunciated by this Court in Long v. Bullard, 117 U.S. 617 (1886), continues in the current Bankruptcy Code. Section 524(a)(2), 11 U.S.C. § 524(a)(2); see H. Rep. No. 595, 95th Cong., 1st Sess. 361 (1977) ("[t]he bankruptcy discharge will not prevent enforcement of valid liens. The rule of Long v. Bullard . . . is accepted with respect to the enforcement of valid liens on nonexempt property as well as on exempt property.").

12. The word is being used here in its generic sense, not in its specific bankruptcy sense, where it refers only to priority among unsecured creditors, 11 U.S.C. § 507.

particular claimant under state law to the asset vis-a-vis others. The priority right of a particular claimant, in other words, may be inherent in the restrictions placed by the state on the use of property in the first instance.[13]

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13. The classic case illustrating this feature of how bankruptcy law must be sensitive to state attributes in evaluating rights among claimants, and not to state (or bankruptcy) labels, is Chicago Board of Trade v. Johnson, 264 U.S. 1 (1924). That case involved a question of how to treat membership by the bankrupt in the Chicago Board of Trade. The District Court and the Seventh Circuit had concluded that the membership was "property" and passed to the trustee in bankruptcy free of all claims of the members and, accordingly, could be sold for the benefit of the general creditors. This Court reversed. Because of rules of membership on the Chicago Board of Trade, a member could not sell his membership, over the objection of another member, unless and until all debts owed by the member to other members were paid in full. Even though the other members did not enjoy the right "to compel sale or other disposition of memberships to pay debts," this Court did "not think this makes a real difference in the character of the property which the member has in his seat." 264 U.S., at 11. The "property" involved — the membership — was defined so as to carry with it a limitation on its value to the bankrupt (and his general creditors): debts to other members had to be satisfied before value could be derived from the membership that benefitted the remaining claimants. Noting that this right was "in some respects similar to the typical lien of the common law," id., this Court held that "[t]he lien, if

It is the resolution of this priority issue -- an issue to which bankruptcy policy is unconcerned -- that is at the core of this case. But in order to see why it, and not the issue of abandonment, is the proper focus, it is worth first considering the case of a debtor that is a corporation and three

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it can be called such, is inherent in the property in its creation, and it can be asserted at any time before actual transfer . . . ." Id., at 15. For that reason, this Court reversed the Seventh Circuit and held that "[t]he claims of the petitioners [members on the Chicago Board of Trade] . . . must be satisfied before the trustee can realize anything on the transfer of the seat for the general estate." Id.

The principle announced in Chicago Board of Trade is a fixed feature of bankruptcy law, and is fully consistent with the admonition in Butner v. United States, 440 U.S. 48, 54-55 (1979), that property rights are created and defined by state law and should be followed in bankruptcy unless the bankruptcy statute clearly directs otherwise. See, e.g., In re Anchorage International Inn, Inc., 718 F.2d 1446 (9th Cir. 1983) (provision of state statute requiring liquor-related debts to be paid before transfer of liquor license would be approved, was tantamount to a "lien" in the license, and would be recognized in bankruptcy). It is the principle that Justice O'Connor recognized in concurring in Ohio v. Kovacs, 105 S.Ct. 705, 712 (1985). See Baird & Jackson, Kovacs and Toxic Wastes in Bankruptcy, 36 Stan. L. Rev. 1199 (1984).

different cases: a case where the debt in question is treated entirely like an unsecured claim; a case in which it is treated as tantamount to having a statutory lien or security interest in the affected asset; and, finally, a case where the obligation in question is effectively secured by all of the corporation's assets.

CASE 1: UNSECURED OBLIGATION

> **Debtor has assets (other than a dump site) worth $450,000, $900,000 of unsecured obligations, and no secured obligations. In addition, Debtor is obligated to State to clean up a PCB dump site. Clean-up will cost $100,000. Once cleaned up, the dump site will be worth $50,000.**

In Case 1, if Debtor were to dissolve under the laws of State, and assuming that State law treated the obligation to State as an unsecured obligation that would not travel with the site property or any of Debtor's other assets, Debtor's assets would be sold for $500,000 and each of the creditors, including State, would receive 50 cents on the dollar. At the conclusion of this

process, there would be no remaining assets or liabilities, and Debtor would dissolve. Unless the sale of the assets involved a fraudulent conveyance or the like, the purchasers would also take the assets free of any liabilities of Debtor, including (under the assumptions of Case 1) the obligation to State.

Nothing really changes -- or should change -- if Debtor is to file a Chapter 7 proceeding in bankruptcy. In that case, the sale of assets and distribution of proceeds is accomplished in bankruptcy, and the claimants all get 50 cents on the dollar, 11 U.S.C. § 726. No discharge is given, 11 U.S.C. § 727(a)(1). But this is not a substantive change. Debtor is free now to dissolve under State law. When Debtor does so dissolve, the claims are, as before, effectively "discharged," because again there would be no Debtor to sue and no assets to go against.

CASE 2: SECURED BY SITE

> **Debtor has assets (other than a dump site) worth $450,000, and $900,000 of unsecured obligations. In addition, Debtor is obligated to State to clean-up a PCB dump site. Clean-up will cost $100,000. Once cleaned up, the dump site will be worth $50,000. Under applicable law, any owner of the site will be required to clean it up.**

In Case 2, if Debtor were to dissolve under state law, it would sell all its assets other than the dump site. No one would pay anything for the site, because its "clean" value of $50,000 is swamped by the associated $100,000 obligation. Unless applicable law provided for shareholder liability, Debtor would dissolve without cleaning up the site. It might thereupon revert to State.[14] When State cleaned up the site, it would have an asset worth $50,000. Its remaining $50,000 claim would share pro rata with the other $900,000 of claimants in the $450,000

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14. If the State refused to permit dissolution, the corporate shell would continue the nominal owner of this asset. But it would have no assets to use to effect clean-up.

of assets. Again, nothing should change if Debtor is in Chapter 7. Whether labeled "abandonment" or "disposition," State would end up with the site, which would compensate it for half the clean-up cost. State's remaining claim would share in the assets as a general creditor.

CASE 3: SECURED BY ALL ASSETS

> **Debtor has assets (other than a dump site) worth $450,000, and $900,000 of unsecured obligations. In addition, Debtor is obligated to State to clean up a PCB dump site. Clean-up will cost $100,000. Once cleaned up, the dump site will be worth $50,000. Due to a state statute, judgments obtained by State for environmental infractions automatically receive a statutory lien on all assets of the infractor and this lien is treated, for all purposes (other than filing) as a security interest under State law.**

In Case 3, if Debtor were to dissolve under the laws of State, the assets, if they could be sold free of State's interest, would be sold for $500,000. Unlike before, however, State would be entitled to receive $100,000 first, on account of its statutory lien, and the other creditors would share in the remaining $400,000 of assets pro rata among

their $900,000 of unsecured claims. As before, at the conclusion of this process, Debtor would dissolve. Since State was paid in full, it would have no remaining claim to pursue into the hands of the buyers of the assets.[15] And the unsecured creditors, although not paid in full, have, as before, no one to pursue. Their claims are effectively discharged, as before.

Again, as before, there would be no change if all this occurred in bankruptcy. In a liquidation under Chapter 7, 11 U.S.C. § 725 would require that State, as a secured creditor, be satisfied in full first.[16]

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15. The assets could be sold along with the clean-up liability. In that event, sale of the assets would fetch $400,000. State would pursue its claim against the assets. There is no functional difference.

16. If, for some reason (such as that State never filed a claim in Debtor's bankruptcy proceeding), State's debt would nonetheless be treated the same as it would appear under nonbankruptcy law. In a Chapter 7 proceeding, State would receive nothing (since it did not file a claim), but the purchaser of Debtor's assets would continue to be subject to the obligation to State, see U.C.C. § 9-306(2) (1978). For that

Nothing changes when the issue is one of abandonment of an asset in bankruptcy. Had the trustee not abandoned the property, the question of priority would have to be faced directly. The City might or might not have the equivalent of a statutory lien on the site (Case 2). It also might or might not have the equivalent of a statutory lien on the remaining property of Quanta (Case 3). No court has yet addressed that issue, yet it is the central issue in this case. Abandonment does not change anything. One still needs to face the question of whether nonbankruptcy law treats the relative priority like Case 1, Case 2, or Case 3 (or, indeed, some other outcome). Once that

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reason, a purchaser would paid only $400,000 for the assets, and State could eventually collect the $100,000 owed it out of those assets. See note 15 supra. But it could not sue Debtor once Debtor dissolved under State law, since Debtor ceases to exist as a legal entity. The effect of this is that State can pursue its collateral, but not Debtor. 11 U.S.C. § 524; Long v. Bullard, 117 U.S. 617 (1886).

outcome were determined, bankruptcy policy would call for its value to be respected. Butner v. United States, 440 U.S. 48, 54-55 (1979). By abandoning the site, the trustee has made a determination that the value of the property, cleaned up, is worth less than it would cost to clean it up. Yet that determination does not affect the question of priority. Upon abandonment, who gets the site? The Third Circuit seems to suggest it went to Quanta, the corporate shell, 739 F.2d, at 914.[17] Presumably, it is an asset that Quanta's creditors can claim, subject, again, to the same question of priority of the rights of the City. Since anyone acquiring the site would have to comply with the clean-up order, however, the site has no value

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17. While this suggests, perhaps erroneously, that the Quanta in bankruptcy is a "different entity" from the Quanta outside of bankruptcy, the effect of this conclusion is that this asset is then an asset of Quanta, the corporate shell. This Court questioned the logic of the "new entity" distinction in NLRB v. Bildisco & Bildisco, 104 S.Ct. 1188, 1197 (1984).

to any of the creditors until cleaned up. That presumably is why the mortgagees abandoned their mortgages. The City spent money to clean up the site; because of that clean-up, the site presumably now has value. One would have thought that because only through the expenditure of money by the City did the site have value, the City gets the property. (It is a lot like a purchase money interest or repairman's lien: the only thing that gave the property value was the expenditure of money by the City of New York. Any owner would gladly give the site to someone who took care of its associated liability.) One would have thought, accordingly, that the property had effectively been abandoned to the City. But if that is so, this is tantamount to a holding that the City of New York has first priority to use the asset to pay for the clean-up: once the clean-up is complete, the City of New York can sell the site to recoup

some of its expenses (Case 2).[18] If this is the effect of abandonment, however, it is perverse to see the City of New York complain about it. By getting first dibs to the asset, the City has, in fact, gotten all out of that site it can.

Presumably, however, the City is objecting to abandonment for another reason. But for abandonment, the City contends, the trustee of Quanta would have had to use as many of Quanta's assets as possible to clean up the site. That, as the analysis above shows, is really only demanding a resolution of the question of the priority of the City relative to the other claimants of Quanta with respect to the remainder of Quanta's assets in line with Case 3. But resolution

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18. The bankruptcy court denied the City a prior lien on the site. The effect of this on who owns the site is unexplored, since the City never appealed that order. See note 4 supra. It is hard to see, however, how one could avoid the outcome that the City would own the site, for the reasons discussed in text. But that, of course, is not a bankruptcy issue at all.

of that priority issue is not a question of bankruptcy law, and has nothing whatsoever to do with the subject of abandonment.

The real question in this case is not one of abandonment but, rather, what nonbankruptcy law says about the right of the City to pursue that obligation against Quanta's assets relative to the right of Quanta's other pre-petition creditors. If, under New York (or federal) law, the right is tantamount to an unsecured obligation (Case 1), then the City should share pro rata with Quanta's other unsecured creditors in the property of the estate assembled under 11 U.S.C. § 541. But if, however, under New York (or federal) law, the right is tantamount to a security interest in the remaining assets, then the City is entitled to have that obligation satisfied first out of the property of the estate (Case 3). And that is true whether state law characterizes the obligation as secured, or the subject of

a statutory lien, or a statutory trust. Intermediate solutions (e.g., Case 2) also exist. But bankruptcy law neither answers that question nor provides an obstacle once it is answered.

CONCLUSION

Amicus believes that focusing on the question of abandonment misses the real issue in this case. When a corporation is insolvent, it cannot pay off all its claimants in full. In that circumstance, where all cannot be paid in full, some claimants will fare better than others, because nonbankruptcy law has given them a right to pursue the assets ahead of the claims of others. Bankruptcy law respects this ordering, 11 U.S.C. § 726. If the obligation Quanta owed to the City is, in effect, secured by a lien on all of Quanta's assets, then the City is entitled to have

that obligation satisfied in full. On this key question, one of the relative status of the obligation of the City vis-a-vis the other claimants to Quanta's assets, the opinions below are silent. Since this is a matter of nonbankruptcy law in the first instance, to which bankruptcy law is then applied, amicus respectfully suggests that, unless certiorari is dismissed as improvidently granted, the judgment below be reversed, and the case remanded for consideration of New York (and nonbankruptcy federal) law on this point.

Respectfully submitted.

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